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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

LANCE WILLIAM GREEN,

Defendant and Appellant.

D057210

(Super. Ct. No. FWV700893)

APPEAL from a judgment of the Superior Court of San Bernardino County, Mary E. Fuller, Judge. Affirmed.

A jury convicted Lance William Green of the second degree murder of Jeffrey Gardiner (Pen. Code, §187, subd. (a))¹ and found true the allegation that he used a deadly or dangerous weapon, to wit, a knife. (§12022, subd. (b)(1).) The court sentenced him to 16 years to life in prison.

¹ All statutory references are to the Penal Code unless otherwise stated.

Green contends the trial court violated his constitutional right to a fair trial by erroneously excluding testimony from his proposed medical expert regarding the "grossly improper medical treatment" the victim received at a hospital prior to his death; and the prosecutor committed prejudicial misconduct by arguing to the jury that the defense had failed to present medical expert testimony to refute that of Dr. Frank Sheridan, Chief Medical Examiner for San Bernardino County. We affirm the judgment.

BACKGROUND

We omit facts regarding Green's stabbing of the victim because they are unnecessary for our resolution of the issues on appeal.

Before trial, the People moved in limine to prohibit Green from presenting testimony that the victim or the treating hospital personnel were contributorily negligent for his death. The trial court deferred ruling on the motion until during trial, and instructed the defense to refrain from mentioning any specific treatment or maltreatment the victim received from medical personnel or the victim's possible contributory negligence.

Dr. Sheridan testified at trial that he had performed the autopsy on the victim, and stated on the death certificate that the manner of death was complications of the stab wound to the abdomen. Specifically, he testified that the wound caused an obstruction of the bowel, which became distended and lost blood supply, producing necrosis of almost the entire bowel and ultimately death. He concluded the cause of death was homicide.

The court conducted an evidentiary hearing under Evidence Code section 402 to determine the admissibility of testimony from Dr. Bernard McNamara, the defense's

proposed medical expert. He opined that the victim's initial emergency room evaluation was adequate, appropriate and within the standard of care. But once he was admitted, the hospital personnel did not observe him long enough or perform sufficient follow-up exams. Moreover, the hospital personnel should have followed up on laboratory tests to determine if he was suffering from an infection or bleeding, and performed a laparotomy or surgical exploration of his abdominal cavity to determine the extent of the stab wound. Dr. McNamara further testified that when the victim was discharged from the hospital after 16 hours, he received a pain killer for his stab wound but not antibiotics, hospital personnel did not perform tests to rule out other injuries, and they failed to give him a specific appointment to return for a timely follow-up visit.

On cross-examination, Dr. McNamara admitted the cause of death was the stab wound, and that if the victim had not gone to the hospital, he would have died as a result of the stab wound:

"[Prosecutor] Okay. And so the stab wound was a substantial factor in causing the death of Mr. Gardiner; wouldn't you say?

"[Dr. McNamara] It was the beginning of all this.

"[Prosecutor] Part of the cause.

"[Dr. McNamara] Part of the cause.

"[Prosecutor] Without the stab wound, he wouldn't have had all these problems and he wouldn't have died; correct?

"[Dr. McNamara] Correct.

"[Prosecutor] Without the stab wound, he wouldn't have even had gone to the hospital; correct?"

"[Dr. McNamara] Correct."

On recross-examination, the prosecutor asked, "If [the victim] didn't go to the hospital, your opinion still is he would have died as a result of the stab wound; correct?"

Dr. McNamara replied, "Right, yes."

On redirect examination, this exchange took place:

"[Defense Counsel:] I think you mentioned earlier that this was not just a reasonable care standard, but in your reviewing the records, was this a gross failure on the part of the hospital? This wasn't de minimis; was it? This wasn't minimal?"

"[Dr. McNamara:] Right. As far as what I saw, this was malpractice, I would say. In terms of the surgical team, I would consider this malpractice."

The trial court, relying on *People v. McGee* (1947) 31 Cal.2d 229 (*McGee*), excluded Dr. McNamara's testimony, stating: "[T]he issue is whether or not there is some evidence that there was a supervening incident that occurred that caused the death of the victim in this particular matter." After analyzing the proffered testimony, the court concluded Dr. McNamara had addressed the hospital personnel's delay in: observing the laboratory results, performing surgery, seeing the victim for a follow-up appointment, and giving him antibiotics. The court concluded, "Here death would have been a normal and foreseeable result of being stabbed in the abdomen and not being treated. And that's where we start. And we go from there. And since the Supreme Court has specifically stated that delay is not a superseding act as a matter of law, the evidence is just simply

not admissible." The trial court also separately relied on *People v. Morse* (1992) 2 Cal.App.4th 620, 639, stating, "where an intervening cause is normal and reasonably foreseeable, the result of the defendant's original act, the intervening act is dependent and not a superseding cause and will not relieve defendant of liability."

Green unsuccessfully moved for a new trial under section 1181 based on the exclusion of Dr. McNamara's testimony.

DISCUSSION

I.

Green contends the trial court violated his constitutional right to a fair trial when it excluded "highly relevant evidence consisting of expert testimony proffered to show the victim died a week after being stabbed as the result of receiving grossly improper medical treatment."

Evidence Code section 210 defines relevant evidence as evidence that has a tendency in reason to prove or disprove a disputed fact that is of consequence to the determination of the action. The trial court has broad discretion in making evidentiary decisions, particularly in determining the relevance of proposed evidence. (*People v. Scheid* (1997) 16 Cal.4th 1, 14.) We review the trial court's evidentiary rulings under the abuse of discretion standard. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1118.)

In *McGee, supra*, 31 Cal.2d 229, the defendant shot the victim, who was taken to the hospital shortly afterwards. The doctors operated on him approximately ten hours after his admission to the hospital but he died approximately seven hours after surgery. (*Id.* at pp. 235, 241.) At trial, defendant moved to introduce a medical expert's testimony,

which defendant contended would have tended to show that the proximate cause of the victim's death was not the bullet wound but the manner in which the wound was treated. The trial court denied the motion. (*Id.* at p. 240; 242-243.) The California Supreme Court concluded that the defendant was not prejudiced by the ruling because the proffered testimony "would not, as a matter of law, have been sufficient to show a supervening cause of death which would relieve defendant from criminal responsibility for the death of [the victim]." (*Id.* at p. 243.)

The *McGee* court stated: " 'When a person inflicts a wound on another which is dangerous, or calculated to destroy life, the fact that the negligence, mistake, or lack of skill of an attending physician or surgeon contributes to the death affords no defense to a charge of homicide.' " (*McGee, supra*, 31 Cal.2d at p. 240.) Further, if "the wound inflicted by the accused operates as a cause of death, the fact that the malpractice of attending surgeons may have had some causative influence will not relieve the accused from full responsibility for the ultimate result of his act." (*Ibid.*) By contrast, if " 'a person inflicts on another a wound not in itself calculated to produce death, and the injured person dies solely as a result of the improper treatment of the wound by an attending physician or surgeon, the fact that the death was caused by medical mistreatment is a good defense to a charge of homicide.' " (*Ibid.*) Improper medical treatment constitutes "gross negligence" when the treatment demonstrates " 'an extreme departure from the ordinary standard of conduct.' " (*Gore v. Board of Medical Quality Assurance* (1980) 110 Cal.App.3d 184, 196.)

In *People v. Roberts* (1992) 2 Cal.4th 271, the defendant was convicted of the murder of a fellow prison inmate. (*Id.* at p. 294.) The court noted that some evidence showed the victim was "relatively well physically on arrival at the prison clinic and died as a result of incompetent medical care." (*Id.* at p. 296.) On appeal, the defendant contended the jury instruction erroneously failed to alert the jury it must decide whether the possibly substandard treatment of the victim was foreseeable. (*Id.* at p. 312.) The California Supreme Court disagreed, concluding based on *McGee* that "If a person inflicts a dangerous wound on another, it is ordinarily no defense that inadequate medical treatment contributed to the victim's death. [Citations.] To be sure, when medical treatment is grossly improper, it may discharge liability for homicide if the maltreatment is the sole cause of death and hence an unforeseeable intervening cause." (*Roberts, supra*, at p. 312.)

Here, the jury was instructed with CALCRIM No. 620, which is based in part on *McGee's* holding: "The failure of Jeffrey Gardiner or another person to use reasonable care may have contributed to the death. But if the defendant's act was a substantial factor causing the death, then the defendant is legally responsible for the death even though Jeffrey Gardiner or another person may have failed to use reasonable care. [¶] The failure of the medical staff to use reasonable care in treating Jeffrey Gardiner may have contributed to the death. But if the injury inflicted by the defendant was a substantial factor causing the death, then the defendant is legally responsible for the death even though the medical staff may have failed to use reasonable care. On the other hand, if the injury inflicted by the defendant was not a substantial factor causing the death, but the

death was caused by grossly improper treatment by the medical staff, then the defendant is not legally responsible for the death."²

The trial court did not abuse its discretion in excluding Dr. McNamara's proffered testimony because although it was offered to show that Green's hospital treatment was a supervening cause of death, it failed to show grossly improper treatment. Instead, Dr. McNamara agreed with Dr. Sheridan's testimony that the victim's stabbing was the cause of death and that even if the victim had not been admitted to the hospital, he would have died from the stab wound. As in *McGee*, Dr. McNamara's proffered testimony "would not, as a matter of law, have been sufficient to show a supervening cause of death which would relieve defendant from criminal responsibility" for the victim's death. (*McGee*, *supra*, 31 Cal.3d at p. 243.)

Green cites to defense counsel's question, quoted above, of whether Dr. McNamara considered that the hospital had engaged in a "gross failure" and whether it "wasn't minimal." Dr. McNamara's responded "right" to a compound question, and therefore we cannot discern whether he was agreeing that the hospital's treatment was gross failure or that its failure was not minimal. In any event, even assuming — simply for the sake of argument — that the hospital's treatment was grossly negligent, Dr. McNamara's testimony did not state that such treatment was the sole cause of the victim's death. (*Roberts, supra*, at p. 312.) To the contrary, he stated that the victim died

² CALJIC No. 8.56 similarly states: "It is not a defense to a criminal charge that the deceased or some other person was guilty of negligence, which was a contributory cause of the death involved in the case."

"because of the complications of the stab wound." As a matter of law, even if there was malpractice, it did not constitute a supervening cause and therefore evidence of malpractice was appropriately excluded as irrelevant.

II.

Green contends the prosecutor committed misconduct and violated his federal due process rights in the prosecutor's rebuttal argument. The prosecutor challenged the defense attorney's closing argument claim that the victim's death was probably caused in part by the victim's conduct or the hospital personnel's failure to use reasonable care. Specifically, defense counsel had referred to Dr. Sheridan's testimony in cross-examination, including regarding the victim's drug use as noted in the toxicology results; the potent pain killers that the hospital administered to the victim, whose blood alcohol level was elevated; and the victim's elevated blood cell count, indicating the victim was fighting an infection. Further, defense counsel referred to CALCRIM No. 620 in arguing that more than one cause of death was possible: "And of course, here we're not even talking about reasonable care with the medical staff. It's disgraceful what happened here. Both disgraceful in the hospital and unfortunately letting that thing just fester, that wound turn into something awful. We saw the dirty gauze. Should not have happened. No one contemplated that. At the time I'm stabbing you, I'm going to see down the line there's go to be a death [*sic*]."

The prosecutor countered in rebuttal that Green is legally responsible for the victim's death, stating, "Let's just say the medical staff should have done surgery on the victim. There's no testimony that they should have at all." The prosecutor continued:

"There is absolutely no evidence that there was any negligent treatment or any grossly negligent treatment which is what the standard is. Not that it was grossly negligent and improper treatment by the medical staff. If there was, don't you think a competent experienced attorney like [defense attorney] would have someone come in to testify about that?" Defense attorney objected to that statement on the basis of prosecutorial misconduct and requested that the jury be admonished. The trial court overruled his objection and did not admonish the jury. The prosecutor continued by summarizing Dr. Sheridan's conclusion regarding the cause of death, stating, "And that's the expert testimony that you have in this case. You have nothing else, no other doctor came to testify about the cause of death. Why? Because no other doctor would disagree." At that point, Green moved for a mistrial, but the trial court denied the motion.

"A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." (*People v. Morales* (2001) 25 Cal.4th 34, 44; see also *People v. Hinton* (2006) 37 Cal.4th 839, 862-863; *People v. Harrison* (2005) 35 Cal. 4th 208, 242.) "[A] prosecutor may argue to a jury that a defendant has not brought forth evidence to corroborate an essential part of his defensive story. . . [when] a defendant might reasonably be expected to produce such corroboration." (*People v. Varona* (1983) 143 Cal.App.3d 566, 570.) "Arguments by the prosecutor that otherwise might be deemed

improper do not constitute misconduct if they fall within the proper limits of rebuttal to the arguments of defense counsel." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1026.) Moreover, "[a] prosecutor is entitled to argue his or her case vigorously." (*People v. Young* (2005) 34 Cal.4th 1149, 1192.) "Even assuming for purposes of argument that the prosecutor's actions constituted misconduct, we may not reverse the judgment if it is not reasonably probable that a result more favorable to the defendant would have been reached in its absence. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)" (*People v. Barnett* (1998) 17 Cal.4th 1044, 1133.)

Here, in rebutting defense counsel's closing argument claim that the hospital was contributorily negligent for the victim's death, the prosecutor correctly commented on the state of the evidence based on the trial court's ruling excluding Dr. McNamara's proffered testimony, which did not show, as a matter of law, that the hospital's treatment of the victim was gross misconduct and a supervening cause of the victim's death. But assuming for the sake of argument that the prosecutor misspoke in stating that the defense could provide no witness regarding the hospital's alleged "negligent treatment" of the victim, because in fact Dr. McNamara's proffered testimony pointed to such evidence of negligence, any error was harmless. As noted, even Dr. McNamara concluded that the stab wound that the defendant inflicted was one of the causes of death and the hospital treatment was not the sole cause of death. Therefore, Dr. McNamara's testimony remained properly excluded as irrelevant as a matter of law, and it was not reasonably likely that Green would have received a more favorable result absent the prosecutor's misstatement.

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

NARES, Acting P. J.

HALLER, J.